United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20328

751

THOMAS HOWARD, JR.
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Was the appellant deprived of a fair trial in which he was convicted of murder in the second degree when the record shows:

1. That the trial Court allowed the jury to consider murder in the first degree when the record shows that premeditation and deliberation could only be based upon an inference.

2. That the trial Court limited the cross-examination of a Government key witness whom the defense counsel sought to impeach as to competency and credibility.

3. That the instruction to the jury as to circumstantial evidence, known as "Instruction No. 10, *Criminal Jury Instructions for the District of Columbia*" was minimized and out-weighed by all the other instructions by the trial Court.

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CITATIONS

CASES:

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* Cases chiefly relied upon are marked by asterisks

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the District Court whereby the appellant was sentenced to from fifteen years to life. The District Court had jurisdiction under Title 22, Section 2401 of the District of Columbia Code, 1961, ed. This Court has jurisdiction of the appeal under Title 28, U.S.C. Section 1291.

STATEMENT OF THE CASE

A one-count indictment filed the 18th day of February, 1966, charged Thomas Howard, Jr. with murder in the first degree. On May 25th, 1966, after a jury trial in the District Court before Judge Leonard P. Walsh of this Court, Howard was found guilty of the lesser included count of second degree murder. By judgment and commitment filed June 10, 1966, he was given a sentence of from fifteen years to life imprisonment.

This appeal is taken from this trial.

THE TRIAL

The evidence of appellant's guilt was entirely circumstantial.

On the night of November 26th, 1965, the appellant and one James Hammett left the appellant's home at 1709 New Jersey Avenue, N.W., where he resided with his wife (Tr. 352) and went to the home of Robert Hammett, brother of James Hammett, at 34 Que Street, N.W., about 7:30 or 8:00 P.M. (Tr. 352) which they did on occasion, to have a few drinks and socialize (Tr. 77). Robert Hammett's apartment was on the second floor (Tr. 54). Joyce Brigmon, the deceased, age 7 (Tr. 95) lived on the first floor in the rear with her mother and Charles Williams, the mother's "common-law" husband (Tr. 52). The appellant knew Joyce as well as her mother and Charles Williams. The appellant had been in their apartment on prior occasions (Tr. 362).

The crucial part of the evening is when the seven or eight people present in the Hammett apartment (Tr. 166, 354) organized a cardgame. After playing two or three hands of cards (Tr. 176, 214) Barbara Hammet noticed that the appellant who had been sitting in her living room was not there (Tr. 128). This was approximately 11 P.M. (Tr. 185).

That about this time one Alonzo Gwynn, a tenant on the first floor of the building, informed Charles Williams that the deceased was scream-

ing (Tr. 110). Williams went to his apartment with Roosevelt Jones, unlocked the door and found the injured child on the kitchen floor (Tr. 60). Williams went out the back door and saw the appellant near an adjacent shed (Tr. 61). The appellant testified that Williams came upon him as he was bent over picking up the child (Tr. 355).

Williams accused and threatened the appellant (Tr. 62, 355) in these circumstances and the appellant ran out of the back door; or, from the adjacent shed mentioned above.

The child's esophagus was rendered useless to make vocal sounds by a sharp instrument which was not found and the same has never been found (Tr. 423).

The pathologist, Dr. Rayford, testified that there was no evidence of sexual molestation or ravishment of the child (Tr. 103).

The appellant took flight because he was frightened. While taking flight, he discarded a jacket and shirt stained by the deceased's blood (Tr. 383-385, 388). Subsequently he returned to the front of the premises, 34 Que Street, N.W., where he confronted Williams and denied committing the crime (Tr. 67). Whereupon, Williams again threatened to kill him and the appellant again took flight (Tr. 355).

Williams and Jones prior to the card game went to their respective places of abode to get a missing card or a new deck of cards (Tr. 202) about 10:00 P.M. (Tr. 127) or 11:00 P.M. (Tr. 185).

Jones testified that at around 11:00 P.M. when he returned from his home that the deceased was not in the Hammett apartment. Also, he understood that the appellant had gone with James Hammett because James Hammett had to catch a bus (Tr. 207). That about this time Williams also went to a nearby gas station to get change for a $5.00 bill for use in the card game (Tr. 69, 177) . . . The appellant went with James Hammett to find a taxicab for James Hammett (Tr. 178).

The appellant testified that he went to the Williams' apartment to see if Williams was there (Tr. 355), when he discovered the child (Tr. 355).

Subsequently, appellant went to his home and returned to 34 Que Street, N.W., with his wife and brother-in-law. In the early A.M. of November, 27th, 1965, he reported to No. One Precinct where he informed the officer on duty that the police department desired to talk to him (Tr. 310-311, 388-389).

The trial Court would not allow counsel to cross-examine Charles Williams as to whether or not he was present at the voir dire (Tr. 75-77).

In discussing the instructions to be given by the Court, counsel for the appellant urged the Court that an instruction as to first degree murder was not warranted in the absence of direct or indirect testimony tending to show premeditation and deliberation because the jury would have to find this element of the crime by pyramiding an inference upon an inference (Tr. 329-344, 449-457).

An instruction as to circumstantial evidence (Tr. 477, 469) as well as to second dgree murder and manslaughter were discussed.

Counsel made their closing arguments to the jury and the Court gave its instructions. The jury retired and came back the following afternoon with a verdict of guilty of murder in the second degree.

Subsequently, the appellant was sentenced from fifteen years to life imprisonment.

RULE INVOLVED

Rules of Criminal Procedure for the
United States District Courts
as Amended

* * *

Rule 52. Harmless Error and Plain Error

* * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF POINTS

1. The District Court erred in instructing the jury as to first degree murder in the absence of direct or indirect testimony as to vital elements thereof.

2. The District Court erred in limiting the cross-examination of Charles Williams, key witness for the Government, which would have gone to his competency and credibility.

3. The District Court erred in its presentation of an instruction as to circumstantial evidence which was too brief and inadequate although otherwise acceptable in content.

SUMMARY OF ARGUMENT

1. A one-count indictment for murder in the first degree does not compel the trial court to instruct the jury as to first degree murder where there is an absence of evidence of premeditation and deliberation. If the conclusion can be reached that such elements existed only through an inference upon an inference then the trial Court was obligated to withdraw the issue from the consideration of the jury. Otherwise, such an instruction, in these circumstances may indicate to the jury that there is sufficient evidence to find murder in the first degree.

2. The trial court is without discretion to limit the cross-examination of a witness as to matters which tend to impeach his credibility, and which may affect the outcome of the trial of the issue set out in the indictment.

3. The instruction as to circumstantial evidence given by the trial court may ordinarily be adequate; but, it was totally inadequate in this case in comparison to the total charge to the jury.

ARGUMENT

1. Admittedly, there is conflict in the testimony as to whether the appellant was in the Hammett apartment when he went looking for Charles Williams in the Williams' apartment; or, if he went to Williams' apartment after putting James Hammett in the taxi-cab. It must be borne in mind that during the course of the evening everyone had been drinking alcoholic beverages and that from all the testimony the sequence of events is inaccurate. Notwithstanding, the case herein is one of pure circumstantial evidence.

It is evident from the record that each witness varies in his testimony as to the sequence of events of the evening; except, that it is from the preponderance of the testimony evident that Charles Williams was present in the kitchen of the Hammett apartment when the appellant was missed just prior to the discovery of the homicide.

The appellant sat throughout the testimony at the trial, heard the statements placing him out of the Hammett premises where Charles Williams was shown to be present by the testimony; but, nevertheless, the appellant took the stand in his own behalf and testified that he left the apartment to find Charles Williams which presupposes that he did not know that Charles Williams was in the Hammett apartment.

The witness Gwynn placed Charles Williams in the Hammett apartment and; shortly thereafter several of the witnesses placed the appellant in the kitchen of the Williams' apartment with the dying child.

From the circumstances there was a possibility that the appellant could have been the murderer based on the proposition that in forethought he had sexual intentions toward the deceased child and with the opportunity to carry out these intentions, he embarked upon this illicit venture. But, there was no evidence of such an inclination or premeditation nor was there pathological evidence of such an occurrence. Furthering this proposition, upon being rejected by the child as was evident by her screams, which indicated resistance to his advances, the appellant then used a sharp instrument to seal her lips forever so that his misdeed would not be disclosed.

But, these hypothetical reasonings are based on conclusions inferred from the primary fact that the appellant was at the side of the child or in the proximity of the situs of her body after the crime had been committed. This circumstance would be consistent with innocence as well as guilt except for the inconsistent testimony as to the appellant's activities within minutes prior to the child's screams; and, whether he was in the kitchen beside the child or in the back yard near an adjacent outbuilding.

Therefore, to conclude from these facts that the appellant may have committed this crime as a matter of inference from the circumstances, does not permit an inference that there was ever a fraction of a second deliberation, which must be inferred from the inferences which led to the conclusion that the crime was committed by the appellant.

The conclusion being that it is incumbent upon the trial court to have ruled out this instruction as a matter of law.

In addition to the argument herein it is prayed to the Court that the trial court committed "plain error" in this matter.

United States v. Ross, 92 U.S. 281.

Rule 52(b), Rules of Criminal Procedure for the United States District Courts, as amended.

2. Counsel for the appellant in the trial court made efforts to locate Charles Williams and Iris Brigmon, the deceased's mother, but could not locate them because they had moved from 34 Que Street, N.W. From witnesses who were subpoenaed by the government, defense counsel were given information that they believed would have been vital to the issues but were unable to develop this line of questioning of Williams.

Consistent with this information, counsel believed and were also informed, that Charles Williams was not present at the voir dire, but out of the hearing of the jury, Williams testified before the Court that he was present. When counsel for the appellant attempted to develop this happening before the jury to impeach the competency and credibility of the witness, the trial court refused further examination along these lines.

It is submitted that a Court in any case may not limit cross-examination, especially in a criminal case, which will prevent the eliciting of material evidence that may directly or indirectly go to the issues on trial.

In addition to the argument herein it is prayed to the Court that the trial court committed "plain error" in this matter.

Dickson v. United States, 182 F.2d 131.

Rule 52(b), Rules of Criminal Procedure for the United States District Courts, as amended.

3. It is conceded by the appellant that the instruction No. 10 of the "Criminal Jury Instructions for the District of Columbia" contains the minimum required elements as to content for a circumstantial evidence instruction. But, that where the entire case is based on circumstantial evidence and where there are necessarily several further instructions

as to the elements of the indicted crime and their lesser included offenses, the sum of which require elaborate instruction to the jury, that the total effect upon the jury is not to impress them as to the circumstance upon circumstance which, if proven amounts to a chain of circumstances upon which they can presume a fact, but to far outweigh the instruction as to circumstantial evidence and impress upon them the several possible findings they can reach and allow them to reach a verdict from their conjecture without the caution and dangers inherent in a case of this nature.

In addition to the argument herein it is prayed to the Court that the trial court committed "plain error" in this matter.

Rule 52(b), Rules of Criminal Procedure for the United States District Courts, as amended.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be reversed, the appellant's conviction vacated and a new trial ordered.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20328

THOMAS HOWARD, JR.

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Filed: May 19, 1967

STATEMENT OF QUESTIONS PRESENTED

1. Was appellant denied a fair trial when the court below allowed the jury to consider first degree murder when there was no evidence of premeditation and deliberation necessary for conviction of first degree murder?

2. Was appellant denied a fair trial when the court below allowed the jury to consider second degree murder when malice could be based only upon an inference pyramided on an inference?

3. Was appellant denied a fair trial when the court below limited cross-examination of a key Government witness?

4. Was the instruction on circumstantial evidence ("Instruction No. 10, Criminal Jury Instructions for the District of Columbia") minimized and out-weighed by all the other instructions of the court below?

5. Does the inadequacy of appellant's preliminary hearing, viewed in the light of other errors below, require a new trial?

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

absence of direct or indirect testimony tending to show premeditation and deliberation because the jury would be forced to find this element of the crime by pyramiding an inference (Tr. 329-344, 449-457).

The court below instructed on first degree murder (Tr. 448-457, 462) and second degree murder (Tr. 457-459, 462, 463). Defense counsel objected to entire charge as being prejudicial to the appellant (Tr. 467).

Motion for acquittal of first degree murder was made at the conclusion of the government's case (Tr. 327). Motion for acquittal of second degree murder was made at the conclusion of the government's case (Tr. 328). Both motions were denied (Tr. 341,342).

STATEMENT OF POINTS

1. The court below erred in instructing the jury as to first degree murder in the absence of direct or indirect testimony as to vital elements thereof. Tr. 50-327, 350-400.

2. The court below erred in instructing the jury as to second degree murder in the absence of direct or indirect testimony as to a vital element thereof. Tr. 50-327, 350-400.

3. The court below erred in limiting the cross-examination of Charles Williams, key witness for the Government, which would have gone to his competency and credibility. Tr. 6, 46-51, 75-77.

4. The court below erred in its presentation of an instruction as to circumstantial evidence which was too brief and inadequate although otherwise acceptable in content. Tr. 447-448, 450-451, 453-454, 469.

5. The preliminary hearing was wholly inadequate in the absence of evidence to support probable cause that appellant perpetrated the murder. Tr. 2-16.

SUMMARY OF ARGUMENT

1. In a one-count indictment for first degree murder, the trial court should not instruct the jury as to first degree murder where there is no evidence of premeditation and deliberation. If the conclusion can be reached that premeditation and deliberation existed only through an inference pyramided upon an inference, the court is obligated to withdraw the issue from consideration by the jury. When there is no motive, and when the facts proved are as consistent with innocence as with the guilt, the charge of first degree murder is unfounded by the evidence. Otherwise, instructions on the issue may indicate to the jury that there is sufficient evidence to find murder in the first degree, thereby confusing the jury. Such instructions also force defense counsel to argue against the death penalty.

2. In a one-count indictment for first degree murder, the trial court should not instruct the jury as to the lesser included charge of second degree murder where there is no evidence of malice. If the conclusion can be reached that such element existed only through an inference pyramided upon an inference, then the trial court is obligated to withdraw the issue from consideration by the jury. Otherwise, an instruction on malice may indicate to the jury that there is sufficient

proper evidence to find murder in the second degree.

3. The trial court is without discretion to limit cross-examination of a witness as to matters which tend to impeach his credibility and which may affect the outcome of the trial.

4. The "standard" instruction on circumstantial evidence is totally inadequate when viewed in the light of the total charge to the jury in a complicated case.

5. The evidence produced at a preliminary hearing is inadequate for probable cause when such evidence is nothing more than hearsay testimony by a policeman.

ARGUMENT

I. SUBMISSION OF FIRST DEGREE MURDER TO THE JURY WAS IMPROPER (Tr. 50-328, 351-400)

The following reflects the sum of the evidence against appellant: A seven-year-old girl received severe throat lacerations; screams were heard by several persons in the building but not by the appellant; appellant was seen at or near the scene of the crime by the child's stepfather and others. Upon seeing appellant at or near the scene of the crime, the girl's stepfather threatened appellant and ran toward him. Appellant thereupon took flight, discarded a blood-soaked jacket and shirt, and returned a short time later to the house wherein the crime had been committed. An hour or two later appellant went to a police station and identified himself as the man the police were seeking in connection with the death of the child.

The key question is whether any of this evidence bears on the issues of premeditation and deliberation. No one identified appellant as the killer. No motive for the killing was proved. The coroner testified that the girl had not been molested sexually. The appellant was a friend of the girl's stepfather and had visited him on previous occasions at his apartment, which was the scene of the crime.

Much is made of the appellant's flight, which does not necessarily prove consciousness of guilt but can be explained as terrorized innocence of one threatened with instant death, as was appellant.

a. There Was Insufficient Circumstantial Evidence of Premeditation and Deliberation ~~(Tr. 50-328, 351-400)~~

Premeditation and deliberation are two necessary elements of first degree murder. Here there was no direct evidence to identify the killer. Thus, the jury first must have inferred that appellant killed the child. Second, the jury then must have inferred that appellant killed the child with premeditation and deliberation.

There is an utter want of evidence as to appellant's premeditation and deliberation. Thus, an inference against premeditation and deliberation is as readily available as an inference for premeditation and deliberation. The inference of premeditation and deliberation was not a necessary one to be drawn from the circumstances, nor even natural. Thus, the evidence was insufficient to support a conviction.

Pertinent language is found in Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947), where this Court stated: ". . . It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. . . ." 81 U.S. App. D.C. at 392, 160 F.2d at 232. In later summarizing its opinion on this point, this Court explained: ". . ./I/f a judge is of opinion that

upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt, he must not let the jury act, because to do so would be to let it speculate without evidence adequate in law. . . ." Cooper v. United States, 94 U.S. App. D.C. 343, 345; 218 F.2d 39, 41 (1954).

An accused must be found to have gone through a series of mental processes in order for the jury to conclude that he entertained the premeditated and deliberate malice required for first degree murder. See Mergner v. United States, 79 U.S. App. D.C. 373, 147 F.2d 572, cert. denied, 325 U.S. 850 (1945). There the Court set forth the facts in this manner:

> ". . . Appellant and the woman whom he killed had been long acquainted; she had worked in his home and he was in love with her; she left his home and his employment; they quarreled over money matters; the day before the shooting, he went to her room and left a $100 bond and a check for $20 for salary due; on the night of the killing, he talked to her over the telephone, they argued again over money, and she asked that he bring her clothes to her; although he usually did not carry a gun, he put one in his pocket and went to see her; after meeting her, she got in his car and they drove to the vicinity of Fifth and A Streets, N.E., in Washington, D. C., where, following an argument, he shot her at least four times at close range; he then drove to Seventh Street, N.E., where he removed a manhole cover and was carrying her body to put it in the sewer when he was interrupted by a passerby; whereupon he left the wounded woman and drove away. In several conversations with arresting officers, he referred to the woman as a 'rat' and revealed a brooding hostility toward her. . . ." 79 U.S. App. D.C. at 374, 147 F.2d at 573.

The Court held this evidence sufficient to prove premeditation and deliberation.

In the case at bar there is a total absence of facts leading to or following the murder tending to prove premeditation and deliberation. Appellant and the child had not been acquainted long. There is no evidence that appellant was in love with her. They had never quarreled over money matters, or any matters. There is no evidence that appellant saw the child at a previous time in close proximity to the killing. There is no evidence to indicate that appellant intended to see the child on the night she was murdered. On the contrary, the evidence indicates he went to an apartment one floor above the floor on which the child was living with the express purpose of attending a party. After the child's throat was cut, the appellant did not try to remove her from her apartment or secrete her. The evidence shows that he did not even try to secrete himself after her throat was cut, but he stayed close by in the kitchen or back yard. In conversations with arresting officers, the appellant at no time revealed a brooding hostility for the child. Appellant therefore contends the proof of circumstances leading to and following the murder have no connection with the requisite premeditation and deliberation.

It is no answer to the lack of circumstances to say that the killing probably was done with premeditation and

deliberation. See Gerson v. United States, 25 F.2d 49 (8th Cir. 1928), where the court said: ". . ./W/hile natural inferences can be drawn from circumstances, such inferences cannot be substituted for circumstances. . . ." 25 F.2d at 60.

The government relies wholly on the suspicion generated by appellant's having left the party prior to the killing, appellant's being seen at the scene of the crime, and appellant's fleeing the scene of the crime and discarding a blood-soaked shirt and jacket while being pursued by the child's stepfather. Appellant contends the suspicion generated by these circumstances are insufficient to ground the charge of first degree murder because there is a missing link in the chain of evidence, that is, there is no evidence to prove premeditation and deliberation.

The government argues that premeditation and deliberation could have been inferred from the disparity in age and strength between appellant and the child, appellant's familiarity with the Williams apartment, and the two or three screams with intervals between them, citing Frady v. United States, 121 U.S. App. D.C. 78, 348 F.2d 84, cert. denied, 382 U.S. 909 (1965). However, in Frady there was direct testimony that the defendants had committed robbery, that the defendants were caught by police officers as they ran from the house of the murdered man, and that the defendants admitted they had a fight with the murdered man from which he died. In the case at bar there were only

suspicious circumstances from which the jury inferred that appellant killed the girl.

As to premeditation and deliberation, there was direct evidence in Frady that the victim's brother hired the defendants to kill his brother. One defendant suggested he could hit a man in the chest, fracture a rib, puncture a lung and kill a person. The brother replied that you must hit a man pretty hard. He also promised a bonus for a good job. In the case at bar there was no such direct evidence from which to infer that appellant had planned to kill the child.

In the Frady case, there was direct evidence by the driver of the car in which defendants were riding that defendants went into the victim's house with heavy material of some kind, from which the jury could infer premeditation and deliberation. In the case at bar there was no such direct evidence from which the jury could infer premeditation or deliberation.

The question is whether there was reasonable doubt as to premeditation and deliberation. Curley v. United States, supra. Giving the prosecution the benefit of every reasonable inference from its affirmative evidence, appellant contends that reasonable minds must speculate to find the vital elements of premeditation and deliberation.

b. Premeditation and Deliberation Existed Only Through an Inference Pyramided Upon an Inference

There was direct evidence by the child's stepfather, Charles Williams, that appellant was seen near the child shortly after the child's throat was cut. In addition, appellant admitted he picked up the child while she was bleeding. No direct evidence was introduced tending to prove that appellant was the person who cut the child's throat. To arrive at the conclusion that appellant killed the child, the jury must have inferred such from the fact that appellant was seen near the child shortly after her throat was cut. This was the first inference the jury was impliedly asked to draw.

There was no direct evidence that appellant premeditated and deliberated before he killed the child, if he did kill her. To conclude that appellant killed the child with premeditation and deliberation, the jury must have inferred such from the disparity of strength and age, the fact that appellant knew the child, and that appellant was familiar with the apartment in which the child lived.

To convict, the jury had to draw three inferences: the first one (legitimate since based on a proven fact) was that appellant killed the child because he was at the scene of the crime. The second inference, based upon the first inference,

was that he killed her with malice since he was much older and stronger than the child. The third inference, the presence of premeditation and deliberation, was unsupported by any relevant facts and apparently was based upon the first inference.

The second and third inferences are nothing more than conjecture or rank speculations. They are inferences from inferences. In United States v. Ross, 92 U.S. 281 (1876), the Court said: ". . . Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. . . . No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is not a circumstance in proof; and it is not,

therefore, a legitimate foundation for a presumption." 92 U.S. at 283-284.

As the court said in Nations v. United States, 52 F.2d 97, 105 (8th Cir. 1931), in an opinion by Judge Stone: "Such double inferences are too remote to constitute evidence. . . ." And in Rosenberg v. United States, 120 F.2d 935 (10th Cir. 1941), the court states: ". . . /A/n inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. . . ." 120 F.2d at 937.

In United States v. Russo, 123 F.2d 420 (3rd Cir. 1941), the court stated:

> ". . . Plainly, knowledge of the illicit character of the goods is an essential element of the crime charged. Assuming, therefore, for the purposes of this case that Russo's constructive possession of the stolen cigarettes supplied proof of the requisite possession called for by the statute, certain it is that the implied possession is incapable of supporting an inference that the constructive possessor knew that the goods had been stolen. . . . This is but the logical result of the rule respecting the efficiency of circumstantial evidence. When circumstances alone are relied upon to establish a fact, they must themselves be directly proven and not presumed. . . . A presumption may not be rested upon another presumption. . . ." 123 F.2d at 422.

c. There Was No Evidence of Motive

The evidence herein was entirely circumstantial. There was no evidence of a plan to commit the crime. There was no proof that appellant bought a knife or other sharp instrument and that he thereupon lay in wait for the child. Yet the government failed to show a motive for the killing.

In State v. Hembree, 54 Or. 463, 103 Pac. 1008 (1909), the court stated:

> ". . . Evidence showing that a party charged with a crime had a motive for committing it is not requisite, though such proof is of great importance in cases depending on circumstantial evidence." 54 Or. at 467, 103 Pac. at 1012.

In People v. Wood, 3 Parker, Cr.R. (N.Y. 681 (1858) the court stated, in referring to a conviction for murder:

> ". . . The case being one of circumstantial evidence wholly, proof of the existence of a criminal motive in the mind of the prisoner to commit the act was essential to making out a case against him which would justify a verdict of guilty. . . ." 3 Parker at 683.

Appellant concedes there were suspicious circumstances in the case, noticeable among which is the presence of appellant at the scene of the crime. But it is conceivable that appellant walked into the apartment and found the dying child on the floor without knowing anything about her injury.

d. The Evidence Was Not Such as to Exclude Every Reasonable Hypothesis Except Guilt

In order to justify a conviction on circumstantial evidence, it is necessary that directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt; otherwise it is the duty of the trial court to instruct the jury to return a verdict for the accused. United States v. Ginn, 124 F.Supp. 658 (D.C. Pa. 1954), rev'd on other grounds, 222 F.2d 289 (3rd Cir. 1945). There the court explained:

> "Defendant's main argument, however, is based on the rule relating to conviction on wholly circumstantial evidence as laid down by the Third and other Circuits. This rule is stated in two different ways. 'In order to justify a conviction on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.'. . . 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. . . ." 124 F.Supp. at 661.

In United States v. Tatcher, 131 F.2d 1002 (3rd Cir. 1942), defendant was convicted of concealing assets of his bankrupt partnership estate from the trustee. Books were kept until two and one-half months before filing of the petition but none were kept in the intervening period. The last book entries showed merchandise on hand of the value of $12,904.06 but the receiver found merchandise worth only $286.00. The court reversed and there again stated the rule on circumstantial

evidence:

> ". . .To justify conviction of crime where the evidence relied upon is circumstantial in nature the evidence must be such as to exclude every reasonable hypothesis but that of guilt. As we have seen the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt. We conclude that the evidence did not sustain the charge of concealment of the assets of the bankrupt estate from the trustee in bankruptcy. . . ." 131 F.2d at 1003.

The same rule was expressed in United States v. Laffman, 152 F.2d 393 (3 Cir., 1945):

> ". . .The one ground of appeal is the sufficiency of the evidence to sustain the conviction. Direct evidence that appellant either made out or sent a false affidavit is lacking. The conviction must rest upon the circumstances surrounding the act which, if proved, would constitute the offense. The prosecution expresses agreement with the legal proposition urged by the appellant and recently reiterated by this Court that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt'. . . ." 152 F.2d at 394.

See also Rodriguez v. United States, 232 F.2d 819, 821 (5th Cir. 1956).

In the case at bar, innocence is one reasonable hypothesis because appellant could have found the child in a bloody state with her throat cut as he entered the apartment in search of Charles Williams, her stepfather, who had left the party in an upstairs apartment in the same building to go downstairs to his apartment to get a deck of cards.

e. Submission of the First Degree Charge to the Jury Forced Defense Counsel to Argue Against the Death Penalty, Thereby Prejudicing Appellant

The trial court's failure to withdraw first degree murder constitutes reversible error whether appellant was prejudiced or not. Nevertheless, appellant was prejudiced by submission of the first degree charge because such a charge made it necessary for counsel to argue against the death penalty. Such an argument was a constant reminder that the charge was first degree murder, dissipating the force of counsel's contention on the absence of guilt. Appellant was deprived of an argument with singleness of purpose--that premeditation and deliberation were not present.

The erroneous submission of a first degree charge to a jury also prejudices an accused in the field of trial tactics. Defense counsel obviously has more options when a first degree murder charge is withdrawn from consideration of the jury. Defense counsel may then keep an inarticulate defendant off the witness stand with less risk. However, if the court instructs on first degree murder, the awesome risk of not taking the stand may be so great that even the least gifted defendant must be placed on the stand.

The government contends this was harmless error since appellant was not convicted of first degree murder but of second degree murder. The fact that the jury by its verdict

of second degree murder impliedly rejected the charge of first degree murder does not automatically prove that the submission of an unfounded count did not influence the jury in a way detrimental to appellant. In 5 Am Jur 2d ¶816, it is stated, "In considering the effect of an erroneous instruction, it is generally assumed that the error influenced the result. . . ."

II. THERE WAS INSUFFICIENT CIRCUMSTANTIAL EVIDENCE OF MALICE TO JUSTIFY SUBMISSION OF THE SECOND DEGREE MURDER COUNT TO THE JURY (Tr. 50-327, 351-400)

Malice is required to support a conviction for second degree murder. Here there was no direct evidence of malice. The government contends there was circumstantial evidence of malice because of the manner in which the child was killed and because appellant knew the child. These two examples are not connected with malice. Therefore, the court below improperly submitted the second degree murder count to the jury.

To conclude that appellant killed the child with malice aforethought, the jury must have inferred malice from the further inference that appellant was the person who killed the child. This inference upon an inference as a mode of arriving at a conclusion of fact is not allowed, as stated above, because of its inherent unreliability since drawn from premises which are not themselves proven facts but merely inferences. United States v. Ross, supra, 92 U.S. 281 (1876). Such premises are too speculative to support conclusions of fact necessary to a conviction of murder and for that reason the jury should not have been allowed to consider the charge of second degree murder.

It was proved that appellant was near the girl shortly after the fatal injury was inflicted. From this fact the jury apparently inferred that appellant was the one who killed the girl. This is one step away from the proven fact that appellant was at the death scene. To reach the conclusion that appellant killed the girl with malice aforethought, another inference must be drawn by the jury. This is two steps away from the proven fact that appellant was at the death scene. Since there was no direct evidence of malice, and since there was no theory of motive for the killing, the jury had to pyramid an inference upon an inference to find malice. Thus, the trial court erred in not ruling that evidence of malice was insufficient. The court below should have withdrawn the lesser included count of second degree murder from the jury.

III. THE COURT BELOW ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF A GOVERNMENT WITNESS (Tr. 6, 46-51, 75-77)

This point is substantially the same as found in Point 2 of appellant's brief.

Trial counsel for appellant had been unable to locate Charles Williams and Iris Brigmon, the deceased's mother, because they had moved from 34 Que Street, N. W. However, counsel obtained information considered vital to the issues. Consistent with this information, counsel believed and were informed that Charles Williams was not present at the voir dire. Out of the hearing of the jury, Williams testified he was present at voir dire. When defense counsel attempted cross-examination to impeach the competency and credibility of the witness, the court below refused to permit further examination along these lines.

It is submitted that a court may not limit cross-examination which will prevent the eliciting of material evidence that may directly or indirectly concern the issues. The court below committed "plain error" in this matter. See Dickson v. United States, 182 F.2d 131 (10th Cir. 1950), and Rule 52(b), Rules of Criminal Procedure for the United States District Courts, as amended.

Cross-examination of a witness is a matter of right. Alford v. United States, 282 U.S. 687, 691 (1931). It is a fundamental right and it may not be restricted improperly. Collazo v. United States, 90 U.S. App. D.C. 241, 252; 196 F.2d 573, 584, cert. denied,343 U.S. 968 (1952). In Lindsey v. United States, 77 U.S. App. D.C. 1, 2; 133 F.2d 368, 369 (1942), this Court stated: "The efficacy of cross-examination as a test of the dependability of testimony is too well understood to require extensive explanation. Evidence supplied through the lips of witnesses is subject to the possible infirmities of falsification or bias and the inaccuracies which flow from fallibility of human powers of observation, memory, and description. The annals of the legal profession are filled with instances in which testimony, plausible when supplied on examination in chief, has by cross-examination been shown to be, for one or more of the reasons mentioned, faulty or worthless. So definitely, indeed, has the efficacy of cross-examination as a weapon for the discovery of truth been recognized in our system of law that cross-examination is held to be a right, not a mere privilege. . . ."

In the light of these cases, appellant contends the court below erred in limiting cross-examination.

IV. INSTRUCTION NO. 10 OF THE "CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA" WAS INADEQUATE TO IMPRESS UPON THE JURY THE CAUTION TO BE EXERCISED IN A WHOLLY CIRCUMSTANTIAL EVIDENCE CASE (Tr. 447-448, 450-451, 453-454, 469)

This point is substantially the same as found in Point 3 of appellant's brief.

It is conceded by appellant that instruction No. 10 of the "Criminal Jury Instructions for the District of Columbia" contains the minimum required elements for a circumstantial evidence instruction. However, No. 10 is inadequate when the entire case is based on circumstantial evidence and when there are several additional instructions regarding elements of the crime and lesser included offenses. Here the additional instructions far outweighed the circumstantial evidence instruction and failed to stress the caution and dangers inherent in a case of this nature.

The trial court committed "plain error" in this matter. See Rule 52(b), Rules of Criminal Procedure for the United States District Courts, as amended.

V. THERE WAS INADEQUATE EVIDENCE PRODUCED AT THE PRELIMINARY HEARING UPON WHICH TO BASE PROBABLE CAUSE THAT APPELLANT COMMITTED THE MURDER (Preliminary Hearing Tr. 2-16)

Appellant contends the evidence produced at the preliminary hearing was insufficient upon which to base probable cause that appellant committed the murder. The only witness for the government, according to the transcript of the preliminary hearing, was Officer Alfred S. Hack of the Homicide Squad, Metropolitan Police Department, who arrived at the scene some time after the crime had been committed. Officer Hack testified that the deceased's step-father, Charles Williams, related to him that Williams and several other persons saw the appellant run from the room in which the child was killed, and that Williams pursued the appellant. Officer Hack also testified that shortly thereafter the appellant went to the police station and stated that he understood the police were looking for him. The appellant admitted that he had been in the kitchen with the deceased and had run from the kitchen. He explained his presence in the kitchen by stating that he had reached down to pick up the child. He explained his flight from the kitchen by stating that he was afraid of Charles Williams, who had threatened to kill him.

Officer Hack admitted there had been no eye witness to the homicide, that there was no indication that the child had been molested, and that there had been no ill feelings between appellant and the child.

Appellant contends Officer Hack's testimony did not furnish probable cause that appellant was the perpetrator of the homicide. Therefore, the appellant should have been set free at the conclusion of the preliminary hearing. Since he was not, the preliminary hearing was a sham and constituted denial of the fundamental rights of an accused.

The necessity of a preliminary hearing has since been heard by the full Court of Appeals which sustained the ruling of the panel that there must be a supplemental hearing after indictment for a murder suspect whose pre-indictment hearing had been defective. See Ross v. Sirica, No. 21,535, ____ U.S. App. D.C. _____, March 24, 1967 (per curiam order denying respondent's petition for rehearing). ". . . A judicial officer engaged in a judicial determination of probable cause can hardly rest easy solely with the hearsay account of the police-man of what these eye-witnesses told him if the eye-witnesses can be available, so that he can listen to their versions and observe their demeanor, and provide an opportunity to defense counsel to explode their account on cross-examination. . . ."

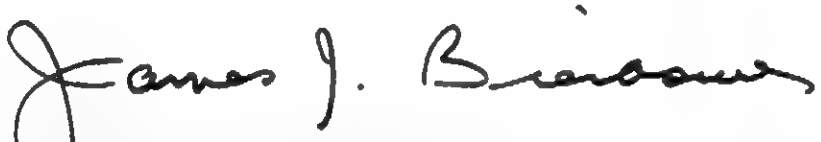
Page 9 of the Separate Statement of Circuit Judges McGowan and Leventhal, appended to the order, dated March 24, 1967, denying rehearing.

The inadequacy of appellant's preliminary hearing, viewed in the light of other errors below, affords an additional argument for reversal.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed, the appellant's conviction vacated and a new trial ordered.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,328

THOMAS HOWARD, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
EDWARD T. MILLER,
Assistant United States Attorneys.

Cr. No. 202-66

QUESTIONS PRESENTED

1) Was there sufficient evidence of premeditation and deliberation to permit the trial judge to submit the charge of first degree murder to the Jury? If not, is reversal required where the jury returned a verdict of murder in the second degree?

2) Did the trial court err in limiting defense counsel's attempt to cross-examine a government witness on a collateral matter in order to impeach his general credibility when, after objection and inquiry, including *voir dire* of the witness, the trial judge confirmed his and the prosecutor's belief, which was supported by the record, that defense counsel was proceeding on a clearly mistaken factual premise?

3) Did the trial court err in failing to elaborate on its instruction as to circumstantial evidence, which is conceded by appellant to have been correct in substance, if no request was made, no proposed instruction was submitted, and no distinct objection stated at trial?

INDEX

TABLE OF CASES

OTHER REFERENCES

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,328

THOMAS HOWARD, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment for first degree murder (D.C. Code § 2401) was filed against appellant Thomas Howard, Jr. on February 18, 1966. In the early afternoon of May 25, 1966, the fifth day of trial before Judge Leonard P. Walsh, the jury returned its verdict of guilty of the lesser included offense of murder in the second degree. Appellant was sentenced on June 10 to imprisonment for fifteen years to life. From the judgment appellant has perfected this appeal.

The record of evidence adduced at trial shows that on Friday, November 26, 1965 the seven year old deceased, Joyce Brigmon, was left alone in her family's first floor two-room apartment, watching TV until bedtime (Tr. 53, 55-56, 77-78, 95). Her mother was at work until fetched after the ensuing tragedy (Tr. 53, 155-56, 175, 228-29, 289). Her mother's commonlaw husband, Charles Williams, was upstairs at a small social gathering in Robert and Barbara Hammett's apartment on the second floor of the same house-turned-apartments at 34 Q Street, northwest, but he made intermittent checks on the child downstairs (Tr. 52-54).

He made the last such check at about eleven p.m. when he went to his apartment to replace a defective deck of playing cards with the ones the child was playing with while watching TV (Tr. 68-69, 94, 177-78). When he left his apartment, he said, he shut and locked the door behind him and detoured to the gas station across the street to get some change (Tr. 86, 178). Estimates of how long he was away varied from a couple of minutes to five or ten minutes, to appellant Howard's estimate of ten or fifteen minutes (Tr. 85, 200, 210, 295, 391-92).

One of the guests at the party was the twenty-two year old appellant (Tr. 55, 126, 166, 184, 281, 294, 298). Howard had not played cards (Tr. 199). Apparently he had left quietly, before the card playing had begun (Tr. 57, 186-87, 281-82). Some of the guests did not see him leave, but apparently he accompanied one or two friends to where one friend could catch a taxi to meet an 11:35 bus to Falls Church (Tr. 128, 168-69, 178-79, 185-87, 199, 207, 281-82, 299-300). Only six persons, five playing cards and one observer, remained in the apartment when the game began (Tr. 124-26, 128, 131-32, 187, 280-81). About ten minutes after they began, or the time it took to play two hands, and according to one of the neighbors who heard them, two screams of a child, the first one loud, broke the night at between eleven-thirty and eleven-forty-five (Tr. 219, 225). Most of the card players heard the

screams (Tr. 58, 70, 92, 129-30, 135, 169-70, 176, 187-88, 200, 212-14, 282-83).

A neighbor, Alonzo Gwynn, who lived in a first floor apartment, beside the Williams apartment, recognized the child's voice which screamed twice, the second time to her "Daddy," from the Williams apartment some time after eleven. A few minutes elapsed as he put his pants on, then went out in the hallway and called to Joyce. Having received no response, he notified Williams in the Hammetts' apartment (Tr. 58-59, 107, 110-11, 114-17, 119-20, 131-33, 170, 172-73, 187, 189-90, 211-14, 283). The child had stopped screaming by then (Tr. 111). Gwynn called the police (Tr. 114).

Williams in his haste passed Gwynn on the stairs and ran into his apartment, perhaps momentarily delayed by the locked door (Tr. 59, 86-89, 111-12, 171, 190). Once in he found the child lying in a pool of blood with her clothes mussed between the frigidaire and the sink. Her throat had been cut. (Tr. 60.) Those who followed described a similar scene (Tr. 112-13, 134-35, 158, 174, 285). Williams did not stop to examine the little girl, however, but ran to the back door and shouted at appellant who was stooping a few feet away in the shadows of the back yard (Tr. 61, 90-91, 114, 158, 164, 191-92). Prefacing his words with an obscenity, he shouted, "I'll kill you!" And while in pursuit until appellant escaped down the alley, Williams screamed at him, asking why he killed the child. (Tr. 62, 72, 90, 191-93, 220, 286-87.) A neighbor, Edward Sloan, whose second floor back porch faced the back of 34 Q Street and permitted a view into the kitchen where the appellant came out followed by Charles Williams, got a good look at both men as they ran very close to him. He was able to identify appellant as the first man who had run out of the kitchen and Charles Williams as the second who had run our right behind him. (Tr. 220-23, 226, 228, 260.)

The Deputy Coroner, Dr. Linwood L. Rayford, Jr., testified that he had examined the child at the Williams

apartment at twelve fifty a.m. on November 27, and pronounced her dead, and later had conducted an autopsy (Tr. 96-99). He described two separate wounds on the anterior neck, a superficial one and one-half inch laceration about the middle of the neck and the death wound, a clean four and one-half inch laceration across the middle of the anterior neck which "divided all of the structures on the anterior portion of the neck, through the skin, through the muscles, through the trachea, which is the windpipe, even through the esophagus or gullet . . . deep enough to impinge on the body of the spinal canal. . . . In its depth it also transsected the corotid [sic] artery on the right side . . . that carries blood to the brain and the head." (Tr. 96-99, 102-03). A sharp instrument of the character of a knife or razor had been used to make the cut (Tr. 102). The doctor explained that after her throat had been cut, the child would have been physically unable to make an outcry (Tr. 99-100). He described other minor injuries and testified that her sex organs had not been molested (Tr. 97, 103).

Charles Williams testified that as Howard fled down the alley to a better lighted section he recognized him by his hooded sweat shirt and brown jacket with its little design and dark pants which he had seen appellant wearing at the party (Tr. 63-65, 91). As Howard ran, he shed his brown jacket (Tr. 72-73). Later, after the police had conducted a search of the area, the brown jacket and the Gulf service station work shirt appellant had been wearing were recovered, the former from the lot between two houses, the latter by some trash cans on the Embassy Dairy parking lot (Tr. 196-97, 231-34, 236-38). The shirt pocket contained a lubrication sticker for the Gulf station for which appellant worked up to and on the day of the murder (Tr. 241-43, 261-62). It belonged to another employee who worked at the station, but the owner of the station, besides identifying the shirt, testified that his employees loaned their shirts back and forth frequently and that they had the privilege of taking them home (Tr. 263-

65, 267). The jacket and the shirt were determined after analysis to have human blood stains on them (Tr. 269-70, 272). Proper continuity of the items was shown to have been maintained after their recovery until their introduction in evidence at trial (Tr. 138-41, 143-44, 146-48, 150-52, 231-34, 236-38, 239-42, 257-58, 269-71). These were identified by witnesses who had been at the party as being those worn by Howard on that night (Tr. 65, 153-54, 195-98, 290-91). The witnesses also supplied ample decriptions of the other clothes appellant had been wearing, including the conspicuous sweat shirt with the hood he had worn under the jacket and the work shirt (Tr. 73, 136, 153-54, 193, 195-96, 198, 290). But the sharp instrument used as the murder weapon, however, was never found (Tr. 144-45, 148-49).

After Williams had chased him, appellant attempted to return to the house a short time later to disclaim responsibility for the child's death and he was then wearing just his sweat shirt with the hood (Tr. 67, 73, 93). But Williams chased after him again and he fled, first home and then to his sister's house where he told his brother-in-law part of his story (Tr. 67, 307-312). At about three a.m. he turned himself into First Precinct where he was immediately taken to the Homicide Squad (Tr. 322).

Detective Sergeant Alfred S. Hack of the Homicide Squad described the results of his investigation of the premises and the surrounding area in some detail. Besides describing his role as custodian of the clothing and the general layout of the buildings in the area, he described as being fair to good the lighting conditions behind 34 Q Street where both Williams and Mr. Sloan, the neighbor, had seen appellant. (Tr. 244-246).

Appellant's Version of the Facts

Appellant Howard took the stand in his own defense. He explained that sometime after arriving in the early morning at his hosts', the Hammetts', second floor apartment at 34 Q Street, he started to leave their party with

James Hammett, a friend with whom he had come. But he changed his mind when Charles Williams and two other guests returned from an errand. (Tr. 352, 360-61, 390-91, 398-99.) Fifteen minutes later, he said, as the guests were about to play cards, Williams said he was going down to his apartment on the floor below to get playing cards. But after he had been gone for ten or fifteen minutes, according to appellant, appellant also left, alone, to look for him at his apartment. (Tr. 354, 359, 362, 390-93.) He claimed that he announced his departure and purpose (Tr. 393).

Appellant did not play cards and was not present while they were being played (Tr. 359-60). He testified that he knew Williams, his commonlaw wife, and their daughter, Joyce, and was familiar with the apartment in which they lived, which he had visited on prior occasions (Tr. 361-62, 396). He went to the apartment, knocked, and when there was no answer, first called, then opened the door which he intimated was ajar and entered the apartment (Tr. 362-64). He had never heard the child scream (Tr. 392).

His attention was attracted first by the television set which was on loud, and then by the body of the little girl with her throat slit lying bloody in the kitchen (Tr. 363-64, 367, 369). He bent over to pick up the girl, who made no sound (Tr. 356, 364, 369). His jacket which he had brought with him out of habit, he said, but had not put on, was, he though, on his shoulder (Tr. 358-59, 362-65). That was the only explanation for the bloodstains on its front (Tr. 364-66).

It was at that point, he testified, that he heard Charles Williams' voice from outside the apartment repeatedly shouting "I will kill you!" and fled in fear of Williams out of the open back door and into the back yard where, in the shadows near a garage, he turned, he said, standing, not trying to hide, to look back to see Williams for the first time coming from the fire escape of the house (Tr. 355, 363-71, 374-76, 382). He traced his flight, which in the course of several blocks passed near where

the two articles of his clothing, the brown jacket and his blue Gulf Service Station work shirt, were later recovered (Tr. 376-81). He admitted that the same jacket and shirt in evidence at trial were his, that he had also been wearing a hooded jacket under his work shirt. He claimed that he had dropped the jacket without realizing it in his flight, but had unbuttoned and discarded his shirt, though without trying to hide it, because he was scared. (Tr. 357-59, 373, 377-78, 380-81, 383-86, 397.)

His fear kept him running, even when he was no longer being chased, as worrisome thoughts of jail and other consequences went running through his mind (Tr. 384-85, 387-88, 397). He had returned, shortly, to the scene of the murder to deny his guilt, but had been chased away again, and this time had returned home where he removed the hooded shirt he had been wearing. While in a T-shirt he talked with some of his family, after which he turned himself into the First Precinct (Tr. 356, 373-74, 389).

The jury was permitted to deliberate after appropriate instructions on the first degree murder count in the indictment, and the lesser included offenses of second degree murder and manslaughter. Its verdict was guilty of murder in the second degree.

SUMMARY OF ARGUMENT

I.

Since the jury returned a verdict of second degree murder on adequate evidence unchallenged on this appeal, no demonstrable harm derived from the trial judge's submission of the first degree murder count to the jury. But in any event there was sufficient evidence of premeditation and deliberation to justify that action. The disparity between the victim, a seven year old little girl, and appellant, the fact that there were two or three separate screams, the fact that a reasonably long period of time was available when appellant could have been in the apartment with which he was familiar and whose occu-

pants he knew, and from the character of the wound, a single deep laceration of the type made by a sharp knife or razor, completely through the neck and impinging on the spinal canal of the child are among the circumstances from which a reasonable juror could have inferred that the murder was the product of premeditation and deliberation.

II.

Having inquired fully into the factual premises for defense counsel's mistaken contention that a government witness had not been viewed by the prospective jurors on *voire dire*, the trial court did not abuse its discretion in refusing to permit defense counsel to inquire further into this collateral matter to impeach the witness's general credibility before the jury.

III.

Appellant's failure to comply with Rule 30, Fed. R. Crim. P. should preclude him from successfully raising at the appellate level his vague contention that he was prejudiced because the trial court's instruction on circumstantial evidence was eclipsed by the court's other instructions. But where as here the jury was amply instructed relevant to appellant's defense founded on insufficiency of the evidence and no special facts required an additional charge or balanced instructions, especially absent a request, the brevity of an otherwise correct criminal charge was within the trial judge's discretion.

ARGUMENT

I. Though implicitly rejected by the verdict of second degree murder, there was sufficient circumstantial evidence of premeditation and deliberation to justify submission of the first degree murder court to the jury.

(Tr. 58-59, 92, 95, 97-100, 102-03, 110-11, 116, 129-30, 132-33, 135, 169-71, 176, 186-90, 200, 282, 351, 359-62, 395-96, 452-53)

There having been no eye witness to the brutal murder of the, Joyce Brigmon, in her family's apartment, the government necessarily relied on a strong web of circumstantial evidence which led to appellant's conviction for second degree murder. Appellant contends on appeal that there was insufficient evidence of premeditation and deliberation to permit the issue of first degree murder even to be submitted to the jury. Appellee is unable to see how appellant, even if right, was prejudiced. But viewing the evidence in the record with all legitimate inferences from it construed as they must be favorably to the government, there is an abundance of circumstantial evidence which, in appellee's opinion, easily met the standard which would have required a directed verdict of acquittal on the first degree murder count only where reasonable jurymen must necessarily have a reasonable doubt as to premeditation and deliberation. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392-93, 160 F.2d 229, 232-33, *cert. denied*, 331 U.S. 837 (1947). In any event there was ample evidence to support the jury's verdict of second degree murder, including of course adequate proof of the element of malice which might be inferred from the deep laceration of the throat of the little girl and the nature of the weapon which must have caused it.

Premeditation and deliberation are, of course, the crucial elements which separate first degree murder from second degree murder. Premeditation is "giving though, before acting, to the idea of taking a human life and reaching a definite decision to kill"; "the formation of a specific intent to kill." Deliberation is "consideration and

reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought." *Fisher* v. *United States*, 328 U.S. 463 (1946), *affirming*, 80 U.S. App. D.C. 96, 149 F.2d 28 (1945) (quoted instructions set out at 328 U.S. 469 at 328 U.S. 470). An "appreciable time," "does not require the lapse of days or hours, or even minutes" was shown by the testimony to have afforded appellant sufficient opportunity for deliberation and premeditation.[1] *Bostic* v. *United States*, 68 App. D.C. 167, 169-70, 94 F.2d 636, 638-39 (1937), *cert. denied*, 303 U.S. 635 (1938).

The record shows that the victim was a little seven year old girl. Disparity of strength and age (appellant was 23) eliminates the likelihood of provocation or self-defense. (Tr. 95, 351.) Appellant himself testified that he knew the little girl, the members of her family, and was familiar with the Williams' two room first floor apartment which he had visited before (Tr. 361-62, 396). The likelihood of sudden surprise, under such circumstances, especially where the television was on loud, would seem to be negligible (Tr. 395). These factors increase the likelihood that premeditation and deliberation were present. The testimony that there were two or three screams with intervals of time between them strongly suggests an extended focus of attention by the killer on his victim with accompanying deliberation during the interval between

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[1] The persuasiveness of the Massachusetts Supreme Court's observation applies undiminished by time:

> It has long been settled that the word 'deliberately' . . . does not mean slowly. It has reference to the purposeful character of the premeditated malice rather than the time spend in premeditation. . . . [W]hile it must be shown that there must be a plan to murder formed after the matter had been made a subject of deliberation and reflection, yet, in view of the quickness with which the mind may act, the law cannot set any limit to the time. It may be a matter of days, hours, or even seconds. It is not so much a matter of time as of logical sequence. First the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution; and all this may occur in a few seconds.

Commonwealth v. *Brooks*, 308 Mass. 367, 32 N.E. 2d 242, 243 (1941)

the screams and the murder (Tr. 58, 92, 110, 116, 129-30, 135). See *Frady* v. *United States*, 121 U.S. App. D.C. 78, 95-97, 348 F.2d 84, 101-03 (1965) (brutal assault "was prolonged sufficiently before the final blows were struck to show a deliberate and premeditated killing"); *Chisley* v. *State*, 202 Md. 87, 95 A.2d 577, 586-87 (1953). And the character of the wound, the single, exceedingly deep laceration through the windpipe and throat all the way to the spinal canal implies a clear and deliberate purpose simply to kill, perhaps to silence screams, and gives no suggestion of frenzy or loss of control by the murderer (Tr. 97-100, 102-03). The fact that the laceration, according to the coroner, was of the type made by a very sharp instrument such as a knife or razor, suggests either the premeditated and deliberate step of obtaining the instrument from the premises or from a pocket and if from the pocket, preparing it for use, unless, of course, the killer entered the apartment with murderous intent and the blade in hand (Tr. 102).

In addition there was testimony which need not be reviewed in detail which strengthened the inferences. Appellant's credibility was questionable. And the evidence showed substantial opportunity to undergo the critical mental processes of premeditation and deliberation. Perhaps most significant among several circumstances was appellant's explanation that he entered the apartment where the murder occurred for the purpose of finding Williams, who had gone to find playing cards. That explanation was doubtful, because various witnesses placed Williams upstairs participating in the card game which had been in progress for several minutes before the screams were heard (Tr. 58-59, 110-111, 132-33, 170-71, 186-87, 189-90, 282, 359-60).

The jury, however, in convicting appellant of second degree murder implicitly refused by doing so to infer premeditation and deliberation from these circumstances. The inference having been rejected, and there being ample evidence from which malice could be inferred, no grounds for appellant's complaint are apparent. But if

the trial judge erred in submitting the first degree murder count with its accompanying issue of premeditation and deliberation, to the jury, the error was harmless because the ultimate verdict was not dependent in any demonstrable way upon proof of those elements.

II. The trial judge did not err in limiting appellant's cross-examination of a government witness which was designed to impeach his general credibility where the factual premise for the inquiry into a collateral matter had been shown clearly to be mistaken.

(Tr. 6-7, 46-47, 50, 51, 75-77)

There was no abuse of discretion in the trial court's refusal to permit appellant the unfettered latitude he sought for cross-examination relating to the alleged presence of a government witness in the courtroom during the *voire dire* of the prospective jury panel (Tr. 75-77). Appellant, of course, possessed an incontestable right to cross-examine the witnesses against him. But a trial court may in the interest of a fair and orderly trial reasonably limit inquiry into collateral matters especially where it is designed to test the general credibility of a witness, as was the case here, rather than to develop a contradiction upon a point in issue before the jury. *Collazo* v. *United States*, 90 U.S. App. D.C. 241, 196 F.2d 573, *cert. denied*, 343 U.S. 968 (1952); *Wright* v. *United States*, 87 U.S. App. D.C. 67, 183 F.2d 821 (1950).

The record itself clearly refutes appellant's contention. On the *voire dire* of the prospective jurors conducted on the afternoon of May 18, 1966, the prosecutor requested the witnesses present to stand for identification before the prospective jurors. The first he called was the government's witness, Charles A. Williams. The record shows that he noted which witnesses were absent as he called their names, thus showing that Williams was not absent. (Tr. 6-7). But appellant's trial counsel mistakenly complained the following morning that the prosecutor had failed even *to call* the witness Williams and demanded a mistrial. The recollection of both prosecutor and judge,

however, differed from that of the defense counsel, and their recollections were supported by the record (Tr. 46-47). In addition, with the jury excused the court called Williams himself. During the ensuing *voire dire* Williams, under oath, testified that he had stood in response to the prosecutor's request on the previous day. Defense counsel declined to inquire. (Tr. 50-51.) Having thus clarified the issue for the record, the trial court's limitation upon further related collateral inquiry was hardly an abuse of discretion.

III. Elaboration of an otherwise correct instruction is discretionary with the court absent timely request or objection.

(Tr. 426-27, 429, 431, 442-45, 447-48, 453-54, 458, 460-61, 467-69.)

Appellee interprets appellant's last contention to be that he was prejudiced by a failure of the trial court sufficiently to elaborate the charge relating to circumstantial evidence. But at trial as on this appeal he has articulated no distinct objection to the instruction, suggested no specific improvements, and cited no grounds for his position. He has thus failed to comply with Rule 30, Fed. R. Crim. P. His contention, therefore, should not be considered for the first time on this appeal. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); see *Rivera* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 553 (1966).

But in addition, the brevity of an otherwise correct criminal charge is within the area of the trial judge's discretion. *Bayer* v. *United States*, 331 U.S. 532 (1947). "It is enough that the trial court correctly charges the jury as to the law with respect to the particular situation before it, and leaves no doubt as to under what circumstances the crime can be found to have been committed." *Graham* v. *United States*, 88 U.S. App. D.C. 129, 187 F.2d 87, *cert. denied*, 341 U.S. 920 (1951). Appellant concedes that the circumstantial evidence instruction the

trial court used as its model[2] "contains the minimum required elements as to content for a circumstantial evidence instruction" (Brief of Appellant, p. 8). He had ample opportunity and did argue his contention that the proof by circumstantial evidence was insufficient (Tr. 426-27, 429, 431). And of course the trial judge was under no absolute obligation to comment upon or summarize the evidence or in effect to argue appellant's case or to adopt his contentions as to the significance or weight of any particular portion of the testimony, in order to give the circumstantial evidence instruction greater emphasis. *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 184 F.2d 394 (1950); *Lewis* v. *United States*, 295 F.2d 441 (1st Cir.), *cert. denied*, 265 U.S. 594 (1924). Nor, there being no affirmative theory of defense supported by substantial evidence or request for an instruction explaining one can appellant claim a prejudicial imbalance in the instructions in this respect. Cf. *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532 (1958). Compare *Levine* v. *Unit-*

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[2] The court's instruction relating to circumstantial evidence was as follows:

> Also, ladies and gentlemen of the jury, the Court will instruct you that there are two kinds of evidence from which you may find the truth as to the facts of this case. That is direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness.
>
> Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant.
>
> The law makes no distinction between the weight to be given to either direct or circumstantial evidence.
>
> Nor, is a greater degree of certainty required of circumstantial evidence than of direct evidence.
>
> You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty. (Tr. 447-48.)

The trial judge took as his model for this instruction, Bar Association of the District of Columbia, Criminal Jury Instructions for the District of Columbia, No. 10 at 5 (1966) (Tr. 469).

ed States, 104 U.S. App. D.C. 281, 261 F.2d 747 (1958). The jury was adequately instructed regarding the government's burden of proving the identity of the perpetrator of the offense and of proving each element of the offense beyond reasonable doubt (Tr. 442-43, 444-45, 453-54, 458, 460-61, 467-68). Though the defense, in substance, contended that the government had failed to meet that burden, the jury found appellant guilty of murder in the second degree. Its verdict, based as it was upon sufficient evidence, should be sustained.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN A. TERRY,
EDWARD T. MILLER,
Assistant United States Attorneys.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,328
(Cr. No. 202-66)

THOMAS HOWARD, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

REPLY TO SUPPLEMENTAL BRIEF FOR APPELLANT

I. Appellant still has not shown prejudice from submission of the first degree murder count to the jury, even assuming arguendo that it was unsupported by evidence.

(Tr. 422-25, 432-35, 437-39)

Appellant was convicted of second degree murder. But, seeking prejudice from the submission of the first degree murder charge to the jury when, appellant contends, it was inadequately supported by evidence, appellee argued that prejudice stemmed from the need for counsel to argue against the death penalty. Whatever force this argument might have, however, is surely diminished by the absence of any reference whatever to the death penalty in his counsel's closing argument (Tr. 426-31). Counsel, rather, contended that appellant was insufficiently linked with the crime, seeking acquittal rather than conviction of the lesser degree. This tactical decision was not unreasonable since the prosecutor made no recommendation as to the death penalty, (Tr. 425). And the prosecutor's careful and restrained exposition of the basis for the first and second degree charges, which focused primarily upon appellant's link with the murder itself, removes any reasonable possibility of prejudice (Tr. 422-25, 432-35, 437-39). There is no cause for reversal on this ground.

II. Malice was amply established in support of appellant's conviction for murder in the second degree.

The element of malice was incontestibly present in the perpetration of the murder of the seven year old left alone in her family's apartment which was the basis for appellant's conviction. The nature of the ghastly wound which caused her death, her age, and the circumstances surrounding the perpetration of the crime and its discovery analyzed in the first argument in appellee's brief amply establish the malice requisite to support a conviction for second degree murder. Appellant's discussion in the second argument in his supplemental brief, unfortunately, seems to demonstrate a misunderstanding of the nature of that element as it is applicable to appellant's conviction. Appellee is constrained, therefore, to point out that

> "Legal malice does not necessarily mean a malicious or malevolent purpose or personal hatred or hostility toward the deceased. It is a state of mind which shows a heart unmindful of social duty and fatally bent on mischief, or which prompts a person to do an injurious act wilfully to the injury of another."

United States v. Edmonds, 63 F. Supp. 968, 970 (1946); Allen v. United States, 164 U.S. 492 (1896); Liggins v. United States, 54 App. D.C. 302, 297 F. 881 (1924).

> [T]he intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing but . . . it may spring up at the instant and may be inferred from the fact of killing.

Allen v. United States, supra at 495. "Malice may be implied or inferred from the act committed, or it may be expressed." Fryer v. United States, 93 U.S. App. D.C. 34, 38 n. 18, 207 F.2d 134, 138 n. 18, cert. denied, 346 U.S 885

(1953); Allen v. United States, supra; Liggins v. United States, supra. See Hansborough v. United States, 113 U.S. App. D.C. 392, 394 n. 8, 308 F.2d 645, 647 n. 8 (1962). "The law is settled that proof of motive is not essential to the establishment of malice." Liggins v. United States, supra at 306, 297 F. at 885. The contention of appellant that malice is insufficiently proved, is meritless.

III. Absent timely objection or showing of prejudice, appellant's complaint simply that his preliminary hearing inadequately established probable cause is frivolous.

Relying entirely upon the contents of a transcript which are not part of the record on this appeal, appellant appears to contend that his convictions should be invalidated solely because the testimony of the government witness "did not furnish probable cause that appellant was the perpetrator of the homicide" and that "Therefore, the appellant should have been set free at the conclusion of the preliminary hearing." He concludes that, "Since he was not, the preliminary hearing was a sham and constituted denial of the fundamental rights of the accused."

Appellee is not required to indulge in a similar impropriety to show that this contention is utterly without merit. Nowhere does the record disclose the slightest previous objection to any aspect of the preliminary hearing which appellant received on November 27, 1965. The instant complaint, therefore, is untimely as Circuit Judge Wright pointed out in Ross v. Sirica, 20,535, D.C. Cir., January 23, 1967, slip opinion at 6-7, "Indeed, in Blue we were careful to point out that persons intending to challenge an alleged defect in

the preliminary hearing procedure should do so promptly and before trial." See Ross v. Sirica, No. 20,535, D.C. Cir., March 24, 1967 (separate statement of Circuit Judge McGowan and Levanthal in support of order denying rehearing en banc); Sutherland v. Sirica, No. 20,903, D.C. Cir., April 21, 1967 (unpublished order denying untimely petition to reopen preliminary hearing to permit subpoena of additional witnesses where only police officer had testified without objection at original hearing). In addition, there is no suggestion of prejudice.* See Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894, cert. denied, 380 U.S. 944 (1965). Appellee is aware of no holding by this or any other case in which a testimony of a police officer from the homicide squad who came on the scene after the crime could not establish probable cause, absent at least any showing that there was an objection or request for other witnesses. No serious defect in the preliminary hearing is thus apparent. In any event, the complaint of a lack of probable cause as appellant has propounded it is mooted by the subsequent indictment by the grand jury. This contention is frivolous.

WHEREFORE, it is respectfully submitted that his supplemental contentions should be rejected and the judgment of conviction affirmed.

/s/ DAVID G. BRESS
DAVID G. BRESS,
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney

/s/ EDWARD T. MILLER
EDWARD T. MILLER,
Assistant United States Attorney

*The record shows that appellant's counsel at the preliminary hearing was also his counsel at trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply to Supplemental Brief for Appellant has been mailed to attorney for appellant, James J. Bierbower, Esquire, Commonwealth Building, 1625 K Street, N.W., Washington, D.C. 20006, this 8th day of June, 1967.

/s/ EDWARD T. MILLER
EDWARD T. MILLER,
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS HOWARD, JR.	:	
Appellant	:	
vs.	:	No. 20328
UNITED STATES OF AMERICA	:	
Appellee	:	

PETITION FOR REHEARING

Appellant requests a rehearing because the Court's opinion (Circuit Judges Burger and Robinson and Judge Davis of the United States Court of Claims) suggests a question involving sufficiency of the evidence. For example:

1. "Since appellant does not challenge the sufficiency of the evidence that he killed the victim, it is unnecessary to give a full précis of the evidence. . . ." Slip opinion, page 2.

2. ". . . The sufficiency of the evidence to support the conclusion that Howard killed the girl is not questioned, and we see no reason to deal indirectly with that issue. . . ." Slip opinion, page 4, footnote 2.

This matter could be clarified by briefing and rehearing.

Respectfully submitted,

James J. Bierbower

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Appointed by this Court
1625 K Street, N.W.
Washington, D. C. 20006
347-1900

CERTIFICATE OF GOOD FAITH

I certify that this petition is presented in good faith and not for delay.

James J. Bierbower

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the office of the United States Attorney, United States Court House, Washington, D. C. on December 21, 1967.

James J. Bierbower